

BRB Nos. 93-1104

MINNIE BROWDER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DILLINGHAM SHIP REPAIR	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Compensation Order-Approval of Attorney's Fees Application of Karen Goodwin, District Director, United States Department of Labor.

Charles Rabinowitz, Portland, Oregon, for the claimant.

Patric J. Doherty (Vavrosky, MacColl, Olsen, Doherty & Miller, P.C.), Portland, Oregon, for the self-insured employer.

Before: HALL, Chief Administrative Appeals Judge , SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order-Approval of Attorney's Fee Application (14-74507) of District Director Karen Goodwin rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The present case has previously been before the Board. On June 14, 1983, claimant injured her lower back. Employer voluntarily paid temporary total disability compensation based on an average weekly wage of \$433.05. Claimant sought and was awarded temporary total disability benefits from June 15, 1984, until September 1, 1985, and permanent total disability compensation thereafter based on the higher average weekly wage of \$500.42. In addition, the administrative law judge denied claimant an assessment under 33 U.S.C. §914(e) and awarded employer relief under 33 U.S.C. §908(f). On appeal, the Board rejected employer's challenge to the administrative law judge's average weekly wage calculation and reversed his denial of a Section 14(e) assessment, holding that employer was liable for a 10 percent assessment on all compensation due and unpaid

from June 14, 1983, the date of claimant's injury until December 18, 1996, the date of the informal conference. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

Subsequent to the issuance of the administrative law judge's March 12, 1989, Decision and Order, claimant's attorney filed a fee petition in which he requested \$731.25, representing 4.5 hours at \$150 per hour and 1.25 hours at the rate of \$45, for work performed before the district director from March 20, 1989, through May 4, 1989, in connection with counsel's attempt to secure the additional compensation employer owed claimant. Employer contested the fee, contending that it had already paid compensation in excess of the compensation due pursuant to the administrative law judge's Decision and Order, and that the Special Fund, rather than employer, owed claimant the increase in past due benefits from June 15, 1983 to August 29, 1987, which the Special Fund could then deduct from the amount it owed employer for permanent total disability compensation. In a Compensation Order dated February 10, 1993, the district director determined that because the available evidence supported employer's assertion that it voluntarily paid compensation in excess of the compensation due under the administrative law judge's Decision and Order, claimant was responsible for a fee of \$615, representing 4.5 hours at an hourly rate of \$125 and 1.25 hours at the rate of \$45. 33 U.S.C. §928(c). The district director further noted that in light of the decision of the United States Court of Appeals for the Ninth Circuit in *Robertson v. Director, OWCP*, 625 F.2d 873, 12 BRBS 550 (9th Cir. 1990), the Special Fund could not be held liable for claimant's attorney's fee.

On appeal, claimant contends the district director erred in determining that she is liable for payment of her own attorney's fee. Claimant avers that although employer voluntarily paid claimant temporary total disability benefits as a result of counsel's efforts before the administrative law judge, additional benefits were owed for the temporary total disability period from June 15, 1983 until September 1, 1985 and 104 weeks of permanent total disability thereafter. Although claimant acknowledges that these additional benefits were ultimately paid by the Special Fund, claimant asserts that because employer was an active litigant with a real economic interest in the proceedings, and claimant obtained additional compensation, employer remained liable for claimant's attorney's fees pursuant to 33 U.S.C. §928(b). In the alternative, claimant contends that fee liability should fall on the Special Fund under the "special exception" rationale recognized by the United States Court of Appeals for the Ninth Circuit in *Robertson*, 625 F.2d at 873, 12 BRBS at 550. Claimant also appeals the reduction in the applicable hourly rate in the event that employer or the Special Fund is deemed liable for the fee. Employer responds, urging affirmance, and claimant replies to employer's response brief.

We agree with claimant that employer is liable for counsel's fee under Section 28(b). Under Section 28(b) when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that voluntarily paid or agreed to by the employer. *See Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). That employer is discharged of its liability for some compensation due to the operation of Section 8(f) does not affect its obligation for attorney's fees under Section 28(b). *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). In the present case, the administrative law judge specifically found that employer's voluntary payments based on an average weekly wage of \$433.05 undercompensated

claimant and awarded him compensation based on the higher average weekly wage of \$500.42. Moreover, claimant's counsel was successful in establishing claimant's entitlement to an assessment under Section 14(e) in the prior appeal before the Board. Inasmuch as claimant's counsel succeeded in obtaining additional benefits for claimant, we reverse the district director's finding that claimant is liable for his own attorney's fee and hold that employer is liable pursuant to Section 28(b). *See Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995). Although claimant's alternate argument that the Special Fund should be held liable need not be addressed in light of our determination that employer is liable for claimant's attorney's fee, we note that the district director properly determined that the Special Fund could not be held liable because the Act sets forth no provision whereby the Special Fund can be held liable for an attorney's fee. *See Robertson*, 625 F.2d at 873, 12 BRBS at 550; *Holliday v. Todd Pacific Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), *overruled on other grounds by Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*); *Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994).

Claimant's argument that the district director erred in reducing the hourly rate from \$150 to \$125 is rejected. Claimant asserts that the district director failed to adequately explain her reduction in the hourly rate. We disagree. After considering the time spent, compensation gained, the complexity of the issues, and the customary hourly rate, the district director determined that a fee based on an hourly rate of \$125 was reasonable and appropriate. While claimant suggests that the reduction in the hourly rate may have been based on claimant's lack of ability to pay, we reject this assertion; there is no indication that this factor played any role in the district director's determination. Moreover, contrary to claimant's assertions, the fact that an hourly rate of \$150 has been awarded for experienced attorneys in other West Coast cases does not mandate that the district director award this hourly rate in this case. The amount of the fee is within the discretion of the body awarding the fee and is determined based on the facts of a specific case. *See Ferguson v. Southern States Cooperative*, 27 BRBS 16, 23 n.8 (1993).

Finally, claimant asserts that the district director's hourly rate determination can not stand because she failed to account for the four year delay in the payment of the fee award. Although the United States Court of Appeals for the Ninth Circuit, within whose appellate jurisdiction this case arises, recently recognized in *Anderson v. Director, OWCP*, F.3d , No. 94-70759 (9th Cir. August 5, 1996), that enhancement for delay may be awarded in appropriate cases under Section 28 of the Act, there is no indication in this case that this argument was timely raised while the case was before the district director. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90, 97 (1995); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995). In any event, claimant has not shown that the rate awarded in this case is unreasonable. *See Anderson*, slip op. at 2, n.2.

Accordingly, the district director's determination that claimant is liable for her attorney's fee is reversed, and the Compensation Order is modified to reflect employer's liability for claimant's attorney's fee pursuant to Section 28(b). In all other respects, the district director's Compensation Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge